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No. 94-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION,
Petitioner (defendant below),

v.

LESLIE RAY COX, *et al.*,
Respondents (plaintiffs below).

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a corporate defendant creates self-serving documents with a view to establishing its good faith intent to comply with the law, and in a subsequent civil action voluntarily produces those self-serving exculpatory documents and asserts in the Pretrial Order that it had acted with good faith intent to comply with the law, can the corporate defendant rely on the attorney-client privilege to preclude plaintiffs from discovery of information necessary to rebut and challenge defendant's good faith defense?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counterstatement of the Case

I. Statement of Facts.

In the fall of 1983, USX Corporation ("USX") and the United Steelworkers of America ("Union") negotiated a local agreement (the "FWA") at USX's Fairfield Works facility.[1] The

[1] USX states that in June 1982, it idled the operations at Fairfield Works as a result of losing $90 million during the first six months of that year. (Pet., p. 2.) Another explanation was that USX was undergoing construction of a new Pipe Mill at Fairfield Works, which was scheduled for completion in late December 1983, and idled operations at Fairfield Works to facilitate construction of a bloom caster and other facilities for the new Pipe Mill.

Union negotiators, Rich and Phillips, high-ranking officials of the Union, requested at the first negotiating session that they and other specified Union officials receive extended leaves of absence from USX retroactive to the last day of their employment at USX (in Phillips' case more than 30 years) and pension benefits from the United States Steel and Carnegie Pension Fund ("Fund") based on that extended leave of absence. Neither the Pension Fund Agreement nor the Basic Labor Agreement between USX and the Union (which provided a maximum 2 year leave of absence) permitted award of such retroactive extended leaves of absence or pension benefits to Union representatives. The Union negotiators' request for retroactive leaves of absence and pension benefits was considered and acted upon by Roderick (USX's CEO), Corry (USX's present CEO), Thomas (USX's CFO), Johnston (USX's Executive Vice President), Graham (USX's President), Miller (USX's Vice President and chief negotiator), Carney (one of USX's counsel), Short (the Fund's Vice President of Administration and USX's Vice President of Employee Benefits), Magistri (Short's assistant) and other USX officials.[2]

On December 24, 1983, when Rich and Phillips refused to sign the FWA Agreement without a favorable reply from USX as to their pension request, Miller and Carney spoke with Johnston on the phone. Johnston immediately thereafter outlined very specific and detailed terms under which USX would agree to the Union representatives' pension request. Miller assured Rich and Phillips that their request "would be considered favorably." (USX App. A, pp. 22a-23a.)

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[2] In 1990, USX was convicted of conspiracy to influence Union officials and violations of 29 U.S.C. § 186, mail-fraud and violations of ERISA, for granting and paying extended leaves of absence and pension benefits to the six Union representatives. The Eleventh Circuit affirmed USX's conviction, *United States v. Phillips*, 19 F.3d 1565 (11the Cir. 1994), and USX has filed a Petition for Writ of Certiorari.

After being told on December 29, 1983 that the Union officials' request would be granted, Short expressed concern about the propriety of granting the Union officials' request, sought advice from Carney and M. G. Heatwole (USX Assistant General Counsel), and, in January 1984, attended a lunch meeting with several of USX's counsel to discuss the issue. Short took notes of his meeting with USX counsel (which have not yet been produced for examination by the Court or plaintiffs' counsel).

From January through November 1984, Johnston, Short and Carney considered the method by which to fulfill USX's commitment to the Union officials. USX granted retroactive extended leaves of absence to the six Union officials by a secret amendment of USX's Leave of Absence Policy by USX's Corporate Policy Committee ("CPC") (a committee of USX's highest management officials). (App. F, pp. 15a-18a; USX App. A, pp. 22a-25a.) Carney, with assistance from Short and Johnson, prepared all drafts and the final proposal submitted to USX's CPC by Johnston and approved by the CPC on October 22, 1984. (App. D, pp. 8a-9a.)[3] Johnson testified that from 1983-1988 he relied on the advice of USX counsel in making decisions

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[3] USX, in its Petition, describes its 1984 Leave of Absence Policy as a "policy [which] permitted a defined class of persons to receive pension service credit." (USX Pet., p.1.) However, USX's 1984 amended leave of absence policy, which at USX's own insistence was held illegal in *Toth v. USX Corp.*, 693 F. Supp. 693 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989), (1) was not prospective, but retrospective, in application (*only Union officials who had left USX's employ before January 1, 1978 were eligible*); (2) placed approval of a Union official's request for leave of absence in the sole *discretion* of Johnston (responsible for USX's collective bargaining); (3) was not publicized or otherwise disclosed to any Union representative (other than the FF Six); and (4) was adopted pursuant to a confidential and unilateral corporate procedure. (App. F, pp. 15a-18a.) *Only* the six Union officials received extended leaves purportedly pursuant to this "policy." However, even under the amended 1984 policy, only one of the six was qualified. USX was convicted for mail-fraud on this basis.

concerning USX's grant of extended leaves of absence and pension benefits to the Union representatives. In November 1984, the Fairfield Six began receiving from the Fund monthly pension payments, and health and insurance benefits, retroactive to March 1, 1984, the effective date of the FWA.

USX never notified any other Union official of this "policy" and did not, until five months later, notify the Union of any change. In March 1985, Johnston wrote Williams (the Union's President) in a strangely vague letter that a change in USX's Leave of Absence Policy had been made and that six Union officials had received USX pension benefits pursuant to that change. Johnston did not include a copy of the "policy," describe the "policy" or even identify the six Union officials.

USX states in its Petition (p.5) that "the issuance of the *Trailways* decision . . . caused USX to reexamine that policy [as amended in 1984]." Although *Trailways Lines, Inc., v. Trailways, Inc., Joint Counsel of Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 47 9 U.S. 932 (1986), was issued in March 1986, and the district court opinion had been issued in February 1985, USX's rescission of the 1984 policy did not occur until May 1987, more than one year later, and USX did not begin paying the pensions into escrow until June 1988, over two years after the *Trailways* decision.

In 1986, Union representative Bruce Thrasher filed suit against USX and the Union claiming that he was entitled to receive pension benefits from USX. Prior to any discovery being taken, Thrasher's action was settled in March 1987. Thrasher agreed to dismiss his Complaint against the Union and USX and to keep the matter confidential. Thrasher was paid by USX an amount (approximately $89,000) equal to the present value of a USX pension benefit calculated based on an extended leave of absence.

In the spring of 1987, however, USX began receiving numerous requests for pension benefits from other Union representa-

tives. On May 14, 1987, the CPC rescinded the 1984 amended Leave of Absence Policy, stating that the law department concurred in its action. (App. H, pp. 21a-23a.) USX denied all requests from the other Union representatives. Johnston wrote a letter, dated April 28, 1987, to Williams stating that USX was *rescinding its 1984 policy because USX had been advised by counsel that "granting such leaves of absence (or accepting such leaves of absence) violates the prohibitions of Section 302 of the Labor Management Relations Act.*" (App. G, pp. 19a-20a.) Moreover, in its answer to one of the plaintiffs' interrogatories in this action, USX stated:

> USX did not believe it had the authority under ERISA to take away pensions once granted and for this reason did not believe it could take away leaves of absence which formed the basis for the grant of such pensions. (App. D, p. 12a.)

In 1988, Union representative Andrew Toth filed an action against USX in Chicago seeking USX pension benefits based on the 1984 policy. USX defended that action, and on September 1, 1988, obtained an order dismissing the action, on the grounds that the 1984 leave of absence policy was illegal under 29 U.S.C. § 186. *Toth*, 693 F. Supp. 693 (N.D. Ill. 1988). In June 1988, USX notified the Fairfield Six that USX would begin paying the Union officials' pension benefits into an escrow account because "we have now been advised by outside counsel that continued payment of pension to you, in light of current legal developments, could possibly subject you and the defendants in these actions [USX and the Union] to criminal liability." (App. L, pp. 30a-31a.)

USX had, of course, been aware of 29 U.S.C. § 186 since its enactment. In 1976, USX (by its general counsel D. B. King) and the Union (by its special counsel Elliott Bredhoff) requested "an opinion by the Department of Justice as to the legality under Section 302 of the Labor Management Relations Act (29 U.S.C. § 186) of implementing" an amendment to the pension agree-

ment qualifying Union representatives for deferred vested pension benefits, and wrote the Department of Justice as follows:

> . . . under this proposal the only period of time used to compute pension benefits would be that period *actually* spent as an employee of U.S. Steel. *No* period after leaving employment of U.S. Steel would be considered in determining the amount of pension, and *no* credit would be given for time spent in employment with the Union. In short, the rights conferred would be in recognition of past work for U.S. Steel only. [Emphasis original.]

After the 1986 lawsuit was filed by Bruce Thrasher, USX created certain exculpatory self-serving documents (the April 1987 letter to Williams, App. G, pp. 19a-20a; the May 1987 CPC proposal, App. H, pp. 21a-23a; and the 1988 letters to the Union representatives, App. L, pp. 30a-31a), which have been voluntarily produced by USX in this action, including the following: (a) an April 14, 1987 legal memorandum from Carney to Johnston recommending that the extended leave of absence policy be abolished (App. I, pp. 24a-25a); and (2) a September 14, 1987 legal memorandum from Carney to Johnston purporting to analyze the extended leaves of absence granted to the Union representatives in light of certain court decisions, including *Trailways Lines, Inc. v. Trailways, Inc., Joint Counsel of Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 479 U.S. 932 (1986) (App. J, pp. 26a-27a).

Other documents created by USX's counsel, Carney, which have been produced by USX include: (1) a document drafted by Carney in 1984 which purports to be a proposed "letter agreement" between Williams (Union's President) and Johnston as to extended leaves of absence for Union representatives; (2) a CPC leave of absence proposal drafted by Carney and an August 1984 memorandum from Carney to Short discussing a "unilateral" approach as opposed to a "letter agreement" (App. F, pp. 13a-14a.) (3) handwritten notes of Carney taken during an October

1983 negotiating meeting in which Rich and Phillips requested extended leaves of absence; and (4) a September 3, 1987 set of notes by Carney of a meeting held between Union representatives Andrew Toth, John Foley and John Eckman and USX officials J. Bruce Johnston, J. D. Short and Jim Carney (App. K, pp. 28a-29a).

On May 15, 1989, USX responded to plaintiffs' interrogatories and requests for admissions concerning USX's payment of pension benefits into escrow by stating that monthly benefits for Union officials Rich, Phillips, Statum, Gurley, Pearson and Shepherd were being paid into escrow accounts "based on the advice of counsel." (App. C & D, pp. 6a-7a, 10a-11a.) On August 25, 1989, without leave of court, USX amended its response to the request for admissions deleting the above language, and on November 13, 1990, USX obtained leave of court to amend its admissions. USX has never amended or sought to amend its May 15, 1989 answers to plaintiffs' interrogatories.

2. Proceedings Below.

In its April 3, 1989 Memorandum in support of its Motion to Dismiss plaintiffs' Complaint, USX stated:

> At the time the amended policy was adopted, USX believed that the policy was lawful. . . . USX decided to rescind the amended leave of absence policy in May 1987 because it believed that, based on *Trailways Lines, Inc. v. Trailways, Inc. Joint Council,* 785 F.2d 101 (3d Cir.), *cert. denied,* 479 U.S. 732 (1986), *continuation* of the policy *might* constitute a violation of Section 302. (App. B, pp. 4a-5a.)

The November 2, 1989 Pretrial Order in this action includes the following statement of USX's position, which was drafted by USX:

> At the time the Company's revised leave of absence policy was adopted and implemented in October 1984, almost one

> year after the Fairfield Agreement was signed, the Company believed the policy to be lawful. The Company believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave of absence policy for Union officials contained in § 13-J of the Basic Labor Agreement between the Company and the Union which had been in effect for a number of years, and which the Union had sought to extend beyond the two-year period for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful. (App. A, pp. 2a-3a.)

In its November 1990 Opinion overruling USX's attorney-client privilege objection, the district court below held:

> USX's defense that it intended to act in compliance with the law necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change. (USX App. B, p. 98a.)

In its January 1991 Opinion, denying USX's Motion for Reconsideration, the district court held:

> The defendant's position in this case does make the legal advice rendered by its attorneys an issue, since it has asserted it intended to conform its actions to the law, and it believed it acted in compliance with the law. (USX App. D, p. 173a.)

USX did not appeal to the Eleventh Circuit the holdings of the district court below that (1) pursuant to *Garner v. Wolfinbarger*, 430 F.2d 1093, (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), USX, the Administrator of the Fund, cannot assert the attorney-client privilege as to communications relating to USX's administration of the Fund (USX App. B, pp. 83a-91a; USX App. D, pp. 137a-139a), and (2) USX waived the attorney-client

privilege as to (a) certain attorney-client communications which USX claimed it had inadvertently produced to plaintiffs' counsel, and (b) certain other attorney-client communications voluntarily produced by USX and all related attorney-client communications or communications on the same subject matter (USX App. B, 99a-102a.)

The Eleventh Circuit affirmed the district court's opinion, holding:

> "it would be inequitable to allow USX to *present evidence tending to show that it intended to comply with the law*, while allowing [USX] to cloak in privilege those documents tending to show it might have known its actions did not conform to the law." [Emphasis added.]
>
> * * *
>
> ... USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege. (USX App. A, pp. 66a-68a.)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Throughout its Petition, and as the basis for its Question Presented, USX repeatedly misstates the grounds for the Eleventh Circuit's opinion below as being "based *solely* on assertions in legal memoranda that a party believed its actions were legal when taken." (USX Pet., p. 10.) [Emphasis added.]

USX has asserted a "good faith" defense in this action, as grounds for its Motion to Dismiss and in the Pretrial Order, that when "the Company's revised leave of absence policy was adopted and implemented in October 1984 . . . the Company believed the policy to be lawful." (App. A & B, pp. 1a-5a; USX App. A, pp. 65a, 68a.) Moreover, the evidence in this action (self-serving documents created by USX prior to this litigation, testimony of Johnston and Short, and USX's answers to interrogatories) contain repeated statements that USX acted in good faith and acted in reliance on advice of USX counsel, and describe and detail that legal advice favorable to USX's claim of good faith intent to comply with the law. (App. C-L, pp. 6a-31a.) Therefore, USX's statement of the issue and the reasons it advances for the granting of certiorari are erroneous.

Secondly, the decisions of the Third Circuit and of the District of Columbia Circuit cited by petitioner are distinguishable and *do not conflict with the Eleventh Circuit's decision below* or with decisions of other Circuits. The Third Circuit expressly recognizes that in circumstances such as those presented by this case where a client places its legal advice in issue and "attempts to prove a claim or defense by disclosing or describing an attorney-client communication," the client has waived its privilege. *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 863 (3rd Cir. 1994).

Thirdly, USX's petition for certiorari should be denied because the Eleventh Circuit's decision clearly and correctly

applies the facts and circumstances of this particular case to the well-established legal principles concerning a client's implied waiver of the attorney-client privilege. USX, however, contends that the attorney-client privilege should be, at all times, "absolute." (USX Pet., p. 26.)

As has been recognized by Professor Wigmore and by the federal courts repeatedly:

> ". . . the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle." [8 Wigmore, Evidence,] § 2291 at 554.

Garner v. Wolfinbarger, 43 F.2d 1093, 1100 (5th Cir. 1970), 401 U.S. 974 (1971). As this Court held in *United States v. Zolin*, 491 U.S. 554, 562 (1989):

> The attorney-client privilege is not without its costs. Cf. *Trammel v. United States*, 445 U.S. 40, 50, 10 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403, 96 S.Ct., at 1577.

Accordingly, when a client acts inconsistently with the privilege's purpose "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice," *Upjohn Co. v. United States*, 449 U.S. 383, 389, (1981), then the client can be found to have waived the privilege. The Eleventh Circuit's decision properly applied the law.

I.

USX'S PETITION SHOULD BE DENIED BECAUSE IT IS PREMISED ON THE ERRONEOUS ASSERTION THAT THE ELEVENTH CIRCUIT FOUND A WAIVER "FROM NOTHING MORE THAN ARGUMENT OF COUNSEL IN LEGAL MEMORANDA"; IN FACT, USX HAS *REPEATEDLY* ASSERTED A GOOD FAITH DEFENSE AND HAS CREATED AND PRODUCED SELF-SERVING DOCUMENTS IN SUPPORT OF USX'S DEFENSE

In 1986, soon after USX was sued by Union representative Bruce Thrasher, USX began creating evidence designed to help USX show it's "good faith" through exculpatory and self-serving letters and internal memoranda describing USX's legal advice. These documents were produced by USX in this action and state, for example, that USX's "best legal judgment at the time [1984] such policy was adopted indicated that it complied with the law." (App. I, p. 25a.) USX also asserted its "good faith" in its statement of its position in the November 2, 1989 Pretrial Order. USX has gone far beyond merely denying criminal intent.

As the Eleventh Circuit recognized, "'it would be inequitable to allow USX to *present evidence tending to show that it intended to comply with the law*, while allowing [USX] to cloak in privilege those documents tending to show it might have known its actions did not conform to the law.'" [Emphasis added.] (USX App. A, p. 66a.) Use of the privilege for such purposes is contrary to the purpose for which the attorney-client privilege is intended, for use "'as a shield, not a sword.'" *Id.*, quoting *GAB Business Services, Inc. v. Syndicate 627*, 809 F. 2d 755, 762 (11th Cir. 1987). "Since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States,*

425 U.S. 391, 402 (1976). Accordingly, the Eleventh Circuit has properly held that USX had waived its attorney-client privilege.

II.

USX'S PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE WHEN THE CLIENT ASSERTS AS A DEFENSE THAT IT INTENDED TO ACT IN COMPLIANCE WITH THE LAW

Central to each case applying an implied waiver doctrine is "a simple principle [which] unites the various applications of the implied waiver doctrine":

> Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege. Thus, since the purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor within the attorney-client relationship, voluntary breach of confidence or selective disclosure for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.

In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982).

This consideration underpins the Eleventh Circuit's decision below. USX's proclaimed intent to comply with the law from 1983 to 1988 turns on what USX knew and understood the law to be at that time. Self-exculpatory documents created by USX and voluntarily produced by USX in this action describe in detail legal advice purportedly given USX (deliberately worded so as to support USX's claim that it acted in good faith with the intent

to comply with the law) from 1986 to 1988 and summarize and describe legal advice purportedly given USX by its counsel from 1983 to 1985. Two former USX officials, James Short and J. Bruce Johnston, who, on behalf of USX, spearheaded the grant of extended leaves of absence and payment of pension benefits to the Fairfield Six, the 1984 amendment of USX's Leave of Absence Policy and the 1988 recission of that policy, and payment by the Fund of the pensions into escrow, have testified in this action that they acted in reliance on advice of USX counsel. Another USX official closely involved in these actions was James Carney, one of USX's counsel. In view of these facts (documents and deposition testimony), which will undoubtedly be placed before the jury, and USX's asserted defense in the Pretrial Order below that "at the time the Company's Leave of Absence Policy was adopted and implemented . . . the Company believed the policy to be lawful," the Eleventh Circuit correctly concluded that USX's voluntary production of self-serving documents and USX's assertion that it acted in good faith and attempted to comply with the law were inconsistent with USX's assertion of the privilege and, thus, that USX had waived its privilege. When faced with similar circumstances, other circuits have reached the same conclusion. See *United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 63 (1991); *Chevron Corp. v. Pennzoil Corp.,* 974 F.2d 1156, 1162-63 (9th Cir. 1992). There is no conflict between the Circuits on this issue.

In *Bilzerian,* the defendant, charged with violating securities laws, argued that he had believed his conduct was lawful and sought to testify as to this at trial. On motion *in limine*, the trial court held that such testimony would result in waiver of the privilege, and defendant then chose not to testify as to his belief. On appeal, defendant argued that he had been prevented from refuting the charge of criminal intent, and that he had not intended to disclose the content or existence of any attorney-client communication or to assert reliance on advice of counsel

as a defense. The Second Circuit, while recognizing that "the potential societal benefit may be great in cases like the one at bar, where defendant seeks legal advice in order to act within the confines of highly complex federal securities laws," held that "the attorney-client privilege cannot at once be used as a shield and a sword." 926 F.2d at 1292. The Second Circuit found:

> The waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue.

Id.

The Second Circuit held that the district court's ruling:

> . . . did not prevent defendant from denying criminal intent . . . Defendant was free to deny criminal intent either without asserting good faith or to argue his good faith defense by means of defense counsel's opening and closing statements and by his examination of witnesses.

Id. at 1293.

In *Chevron*, Pennzoil took the position that its acquisition of Chevron stock for investment purposes was reasonable based on tax considerations as advised by counsel. The Ninth Circuit held:

> [T]o the extent that Pennzoil claims that its tax position is reasonable because it was based on advice of counsel, Pennzoil puts at issue the tax advice it received. In his declaration, Chairman Lietdke stated that insofar as Pennzoil's decision to proceed with the Chevron investment was based on tax considerations, that decision was made based upon advice of counsel. Pennzoil cannot invoke the attorney-client privilege to deny Chevron access to the very information that Chevron must refute in order to

> demonstrate that Pennzoil's Schedule 13D is materially misleading.

974 F.2d at 1162, 1163.

The decisions relied on by USX in its Petition,[4] in which the courts found no waiver, are distinguishable on their facts. The defenses asserted in *Rhone-Poulenc* and *White* did not necessarily implicate the attorney's advice. Those opinions do not conflict with decisions of other circuits, including the Eleventh, Ninth or Second Circuit decisions.[5]

In *Rhone-Poulenc*, plaintiff, which sold a blood-clotting product (Factorate) for use by hemophiliacs and had been named in a series of AIDS-related lawsuits, sought a declaratory judgment as to insurance coverage for the AIDS-related cases. The insurers argued that plaintiff knew before obtaining insurance coverage that use of Factorate transmitted HIV and, therefore, the claims are excluded from coverage, and asserted the affirma-

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[4] *Rhone-Poulenc Rorer, Inc. V. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994); *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989).

[5] *In Re Burlington Northern, Inc.*, 822 F.2d 518, 533 (5th Cir. 1987) (finding that antitrust defendant's reliance on the *Noerr-Pennington* doctrine was not "a claim or defense that explicitly relies on the existence or absence of the very communications for which he claims a privilege," and, therefore, found no waiver); *Lorenz v. Valley Forge Insurance Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987) (finding, in an action alleging bad-faith failure to pay, that where the insurer offered testimony of its attorney that the insurer had offered to settle the plaintiff's claim after the suit was filed there was no waiver because "Valley Forge did not assert that the offer to settle was made in good faith - it did not have to. Valley Forge sought to show only that post-filing offers had been made."); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1204-1207 (8th Cir. 1982), *cert. denied*, 459 U.S.1017 (1982) (in which the Court held that an investor's claim that he had invested in an oil drilling company in reliance on fraudulent misrepresentations of the company's employees was not a waiver of the privilege. The company had argued that the investor's legal advice might be relevant to whether the investor's reliance was reasonable, but the Court held that "we cannot perceive how receipt of ordinary legal advice could have made reliance unreasonable." *Id.* at 1207).

tive defense that plaintiff had intentionally failed to disclose its knowledge of the potential for AIDS-related claims. The Court held:

> It appears that one matter in issue in this case is whether or not the insureds knew, before they obtained coverage, that Armour's pharmaceutical products were causing the transmission of HIV. Rhone-Poulenc has not waived the attorney client privilege by filing this lawsuit or by placing its state of mind in issue. *As Rhone-Poulenc and Armour have not interjected the advice of counsel as an essential element of a claim in this case*, the district court erred in affirming the magistrate judge's decision and in finding they must disclose documents relating to the AIDS-related evaluation that would otherwise be protected from disclosure by the attorney client privilege. [Emphasis added.]

32 F.3d at 864.

The Third Circuit distinguished *Rhone-Poulenc* from cases, such as the cases presented to the Eleventh Circuit below and to the Second and Ninth Circuits, in which "the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue." *Id.* at 863. In such cases, the Third Circuit held:

> Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. *The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.* [Emphasis added.]

Id.

In *Rhone-Poulenc,* the issue of plaintiff's knowledge was raised by the insurer's defenses, not by the plaintiff-client's request for declaratory judgment, and the insurer sought information showing plaintiff's knowledge that its product transmitted HIV (a technical issue); attorney-client communications, although relevant, were not central to this information. Unlike *Rhone-Poulenc*, in the present case USX (the client) has raised the issue of its knowledge of the law, has created and produced self-exculpatory documents which purport to show that USX has at all times acted on advice of its counsel, and attorney-client communications comprise the basis of USX's knowledge.

In *White,* the defendant (sole shareholder and president of Southern Investment Co. who was convicted of conspiring to defraud the United States under 18 U.S.C. § 371) argued that he believed the "consulting" arrangement between Southern and Finotti, a government agent, was legal because Finotti had reported receiving permission from his superiors. White's belief and intent was not founded on any attorney-client communication. White's primary defense was a general denial of *mens rea.* The Court found that there was no waiver because:

> To be acquitted for lack of criminal intent, White did not need to introduce any evidence of communications to and from [his counsel], and he did not do so.

In the case below, unlike *White,* USX went beyond a mere denial of intent to assert that it believed (based on its advice of counsel) that USX had complied with the law, 29 U.S.C. § 186 and cases interpreting that statute.[6]

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[6] USX's argument that it did not know the law until the March 1986 Third Circuit opinion in *Trailways* is specious and should be firmly rejected by this Court. See, e..g., *Miller v. Amusement Enterprises, Inc.,* 4526 F.2d 534, 536 (5th Cir. 1970):

> The reasoning would essentially transplant the effective date of any statute from the date as fixed by the legislature to the date of the first

(Footnote 6 continued on next page)

USX argues, as additional grounds for granting certiorari, that the Eleventh Circuit's decision creates "uncertainty and unpredictability" as to the application of the implied waiver doctrine and is, therefore, at odds with this Court's decision in *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

As shown above, however, the Eleventh Circuit, in finding a waiver of the privilege, employed legal principles and analysis consistent with *Upjohn* and with *Rhone-Poulenc* and *White.* The Eleventh Circuit's decision, as in *Bilzerian* and *Chevron,* clearly demonstrates that in litigation when a client chooses to assert or raise for its own benefit its good faith intent to comply with the law and produces documents in that action which describe the legal advice given the client, then the client has acted inconsistently with the privilege's purpose and, therefore, waives the privilege. See also *Rhone-Poulenc,* 32 F.3d at 863 (waiver occurs when client places advice in issue and "attempts to prove a claim or defense by *disclosing or describing* an attorney-client

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(Footnote 6 continued)

> authoritative judicial interpretation. It would also mean that the person whose post-effective date (as legislatively fixed) action is the first to be judicially declared in violation of the statute could not be held accountable. . . . Conversely the injured party would have few if any remedies even though expressly provided by the statute in breaking the ground . . . . A fictionalized approach which grants effectual absolution to the first defendant (civil or criminal) and makes a sacrificial lamb of the first victim is hardly acceptable.

Moreover, in *Salvucci v. Gravure Division of Triangle Publications,* 494 F.Supp. 126 (E.D. Pa. 1980), *aff'd,* 649 F.2d 860 (3d Cir. 1981), the district court held that an oral agreement by an employer and union representative pursuant to which the union representative would be granted an extended leave of absence and paid severance benefits would violate 29 U.S.C. § 186. See also *Haley v. Palatnik,* 509 F.2d 1038, 1042 (2nd Cir. 1975). Furthermore, the district court's opinion in *Trailways,* holding that the employer's contributions of pensions for union representatives was illegal, was decided in February 1985.

communication"). In addition, the Eleventh Circuit and other courts have recognized the inherent prejudice which occurs when a client asserts its belief that its actions were in compliance with the law and produces or describes advice in support of those actions, yet seeks to preclude the other litigant from discovering evidence to rebut and challenge that defense. (USX App. A, p. 66a.) See also, e.g., *Chevron*, 974 F.2d at 1163; *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989), in which the Court found a limited waiver of the privilege where plaintiff claimed to have had no knowledge of the basis of his RICO claim until after being informed by his attorney, and recognized:

> The great weight of authority holds that the attorney-client privilege is waived when a litigant "place[s] information protected by it in issue through some affirmative act for his own benefit, and *to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.*" [Emphasis added.]

Recent district court decisions demonstrate that the courts have uniformly applied this rule, balancing the interest of the client in preserving the privilege, the public's interests and the litigants interest in discovery of relevant evidence. See, e.g., *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765 (D. Del. 1994) in which defendants charged with violations of the Investment Company Act of 1940, took the position that they believed their actions were lawful and "raised the 'act' of consulting counsel" as evidence of their good faith but denied reliance on advice of counsel. *Id.* at 767. The Court held:

> Even if the Lee Defendants intend only to rely on the act of seeking advice from counsel to show they behaved in good faith, Plaintiffs are entitled to test the validity and sincerity of that action. In order for Plaintiffs to have a fair and adequate opportunity to test and rebut Defendants' allegations that they sought advice from counsel, Plaintiffs are

> entitled to know, for example, whether the Lee Defendants disclosed all material facts to counsel, whether counsel gave an otherwise well-informed opinion, and did the Lee Defendants follow the advice from counsel.

The Eleventh Circuit did not affirm the district court's finding of waiver simply because the communications were relevant. As Rule 26(b), Fed. R. Civ. P., contemplates privileged information is very often relevant to issues in an action. The Eleventh Circuit held that by "affirmatively assert[ing] good faith, USX injected the issue of its . . . knowledge of the law into the case and thereby waived the attorney-client privilege." (USX App. A, p. 68A.)

The Eleventh Circuit's decision, finding that under the particular circumstances of this case USX has waived the attorney-client privilege as to certain communications with counsel, fairly balances the interest expressed in *Upjohn*, to encourage full and frank communication with counsel without fear of later unexpected compelled disclosure, 449 U.S. at 389, and the interest expressed in *Fisher*, that the attorney-client privilege which has the effect of withholding relevant information should apply "only where necessary to achieve its purpose." 425 U.S. at 402.

CONCLUSION

This Court should deny USX's Petition for Writ of Certiorari.

Respectfully submitted,

J. Vernon Patrick, Jr.*
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William M. Acker, III
Elizabeth N. Pitman
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(205) 323-5665

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*Counsel of Record

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION,
a Delaware corporation, et al.,
Defendants.

PRE-TRIAL ORDER

[Filed November 1, 1989]

A pre-trial conference was held in the above case on October 30, 1989, wherein, or as a result of which, the following proceedings were held and action taken:

1. *Appearances.* Appearing at the conference were:

(a) *For Plaintiffs*:

J. Vernon Patrick, Jr.
Alex S. Lacy
William M. Acker, III
Elizabeth N. Pitman
Samuel Maples
Michael H. Bite, Jr.

(b) *For Defendants Company and Fund*:

Michael L. Lucas
Leonard A. Scheinholtz

(c) *For Defendant Union*:

Joe R. Whatley, Jr.
Jerome A. Cooper
Carl B. Frankel

TRIAL DATE: July 9, 1990

* * *

(c) *Defendants' position*:

(1) Company and Fund. * * *

At the time the Company's revised leave-of-absence policy was adopted and implemented in October, 1984, almost one year after the Fairfield Agreement was signed, the Company believed the policy to be lawful. The Company believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave-of-absence policy for Union officials contained in § 13-J of the Basic Labor Agreement between the Company and the Union which had been in effect for a number of years, and which the Union had sought to extend beyond the two-year period for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful.

The Company, as the plaintiffs' amended complaint itself clearly shows, rescinded the policy in 1987 because of the intervening court decisions of the Second and Third Circuits in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986), and *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986). The Company's principal place of business, Pittsburgh, Pennsylvania, is in the Third Circuit. The Company and the Fund do not understand how the plaintiffs can criticize the Company for rescinding the policy in order to conform to court decisions issued after adoption of the revised leave policy and to protect

itself against possible criminal charges under § 302 of the LMRA, 29 U.S.C. § 186(d)(2).

* * *

ORDERED this the 1st day of Nov., 1989, that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, et al.,

MEMORANDUM OF USX CORPORATION AND UNITED STATES STEEL AND CARNEGIE PENSION FUND IN SUPPORT OF THEIR MOTION TO DISMISS

S. G. Clark
Billy M. Tennant
USX CORPORATION
600 Grant Street
Pittsburgh, Pennsylvania
15230
(412) 433-2977

F. A. Flowers, III
Michael L. Lucas
BURR & FORMAN
3000 SouthTGrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Attorneys for Defendants, USX Corporation
and United States Steel and Carnegie Pension Fund

* * *

At the time the revised leave-of absence policy was implemented in October, 1984, almost one year *after* the Fairfield Agreement was signed, USX believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave-of absence policy which had been in effect for a number of years, and which had been the subject of a dispute

between the Company and the Union for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful.

The Company, as the complaint itself clearly shows, rescinded the policy in 1987 because of the intervening decisions of the Second and Third Circuits in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); and *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 107 S.Ct. 403 (1986). (Complaint Ex. #D). The Company notified the Union accordingly. (Complaint Ex. #C). Of course, the Company's principal place of business, Pittsburgh, Pennsylvania, is in the Third Circuit.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

UNITED STEELWORKERS OFAMERICA,
AFL-CIO-CLC,et al.,
Defendants.

RESPONSE OF DEFENDANTS USX CORPORATION AND THE UNITED STATES STEEL AND CARNEGIE PENSION FUND TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS:

Comes now Defendants USX Corporation (the "Company") and the United States Steel and Carnegie Pension Fund (the "Fund") and for their responses to each numbered paragraph of Plaintiffs' First Request for Admissions say as follows:

* * *

51. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

52. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

53. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

54. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

55. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

56. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION,
A Delaware corporation, et al.,
Defendants.

DEFENDANT USX CORPORATION'S ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendant USX Corporation ("USX" or "the Company") hereby responds to Plaintiffs' First Set of Interrogatories as follows:

* * *

18. Please identify each officer of the "Company" who drafted or approved Exhibit "A" prior to the October 22, 1984 meeting of the Corporate Policy Committee of the "Company".

ANSWER TO INTERROGATORY NO. 18

James D. Short, T. W. Sterling, J. Bruce Johnston.

19. Identify each individual employed by the "Company" who supervised the drafting of Exhibit "A" prior to the October 22, 1984 meeting of the "Company's" Corporate Policy Committee.

ANSWER TO INTERROGATORY NO. 19

In addition to those individuals identified in the response to Interrogatory No. 18, James T. Carney and C.E. Magistri, Assistant to the Vice-President, Benefits Administration.

* * *

44. Please identify the individual or individuals who determined or drafted the criteria (if any) and the eligibility requirements to be applied by the "Company" in determining which applications for a Leave of Absence greater than two years would be approved and which would not be approved by the "Company" or by the "Fund".

ANSWER TO INTERROGATORY NO. 44

J. Bruce Johnston, James T. Carney

* * *

61. Please state whether an escrow account has been established for receiving and holding in escrow any pension payments which were awarded to any of the six "Union" officials referred to in Exhibit "B" (E. B. Rich, Thermon Phillips, Ralph Gurley, et al.) who received a Leave of Absence (pursuant to the "Company's" revised policy (described in Exhibits "A" and "B") from the "Company". If so, please identify (a) each of the reasons why the escrow account was created; (b) the date on which an escrow account was established to receive such pension payments to the six "Union" officials (E. B. Rich, Thermon Phillips, Ralph Gurley, et al.) who received a long-term Leave of Absence from the "Company"; (c) the parties to such escrow agreement; (d) the person(s) or entity holding the money in escrow; and (e) state whether each of the six "Union" officials or representatives is still receiving life insurance coverage or health insurance coverage paid by the "Fund" or the "Company".

ANSWER TO INTERROGATORY NO. 61

Pensions are currently being paid into escrow at Mellon Bank in the case of the six Union officials.

a. Advice of counsel.

b. See pension files of the six Union officials from Fairfield produced in response to Request for Production of Documents.

c. See the above response.

d. Mellon Bank.

e. No.

* * *

63. State whether any of the six "Union" officials referred to in Exhibit "B" are presently receiving any pension benefits from the "Fund" or from the "Company".

A. If not, state whether any pension benefits for any of the six "Union" representatives are presently being paid into escrow or held in escrow.

B. If such benefits are being held or paid into escrow, identify why and when the "Company" first discontinued making payments directly to the recipient of the benefits and instead began paying, or holding, such pension benefits in an escrow account.

C. Identify each "Company" or "Fund" officer or employee involved in the decision to discontinue making pension payments direct to one or more of the six "Union" representatives referred to in Exhibit "B," or involved in the decision and in any arrangements made with respect to paying into escrow or holding in escrow payments for pension benefits for the six "Union" officials referred to in Exhibit "B."

ANSWER TO INTERROGATORY NO. 63

63. No.

A. Yes

B. Yes, see pension files produced in response to Request for Production of Documents. Amounts paid into escrow on advice of counsel.

C. J. D. Short, James T. Carney, J. Bruce Johnston.

* * *

75. In the last paragraph of Exhibit "C," the following statement was made:

> Accordingly we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change we are denying several recent requests for such leaves-of-absence (apparently based on the earlier amendment) from the employees of the International Union. We are not rescinding the leaves-of-absence which previously had been granted pursuant to such policy.

A. Please identify each "Union" employee or official referred to in Mr. Johnston's letter (Exhibit "C"), who had previously been granted a Leave of Absence by the "Company" pursuant to the revised policy adopted on October 22, 1984, but whose Leave of Absence was not rescinded by the "Company" prior to Johnston's April 28, 1987 letter to Lynn R. Williams (Exhibit "C").

B. Please identify each of the reasons why the "Company" did not rescind the Leave of Absence previously granted certain "Union" officers or employees (Thermon Phillips, E. B. Rich, Carl Statum, Ralph Gurley, Virgil Pierson and Fred Shepherd).

ANSWER TO INTERROGATORY NO. 75

A. The six Union officials who had previously been given leaves of absence.

B. USX did not believe it had the authority under ERISA to take away pensions once granted and for this reason did not believe it could take away leaves of absence which formed the basis for the grant of such pensions.

* * *

APPENDIX E

PLAINTIFF'S EXHIBIT #111

UNITED STATES STEEL
CORPORATION
Interorganization Correspondence
Date: August 27,. 1984
From: James T. Carney
General Attorney

To: J. D. Short
Vice President
Administration

Subject: *Pension Request of the International Union*

Following up on our conversations concerning the above matter, it is my understanding that it seems preferable from an employee relations standpoint to grant the above request from the International Union on a unilateral basis as opposed, for example, to entering into a specific letter agreement granting such request. Accordingly, it is your thought that a proposal be made to CPC to approve leave of absences on the basis discussed with the International Union and that such proposal be implemented unilaterally upon CPC approval. Accordingly, by carbon copy of this memorandum, I am asking J. C. James to disregard my memorandum of August 24, 1984 regarding the above and to modify Paragraph B-2-d of PER 223-51 as follows: "except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time." Attached hereto is a draft of language to be used in the context of a CPC resolution regarding the above.

/s/James T. Carney

sms
Attachment

cc: T. W. Sterling
w/attachment

D. B. King
w/attachment

J. G. James

DRAFT
8/27/84

Effective September 1, 1984 for the purpose of determining eligibility for and the amount of benefits under Sections 2.1, 2.2, 2.4, 2.5, 2.6(a)(4) and 2.7(a)(5)(iii) of the 1980 Non-Contributory Pension Rules and any successor thereto, any employee from production and maintenance or clerical and technical bargaining units represented by the United Steelworkers of America at United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed shall be granted a leave of absence in between the date on which such employee left active employment with U. S. Steel Corporation and the earlier of (a) the date of retirement from United States Steel Corporation or (b) the date employment with the International Union terminates. Notwithstanding anything to the contrary contained herein, no such employee shall receive any benefit under the Non-Contributory Pension Rules except insofar as he satisfies all eligibility criteria for the retirement in question and any pension payable such an employee shall be calculated under the minimum formula.

* * *

APPENDIX F

PLAINTIFF'S EXHIBIT #75

UNITED STATES STEEL CORPORATION
CORPORATE POLICY COMMITTEE
Meeting of October 22, 1984
Pittsburgh, Pennsylvania

A meeting of the Corporate Policy Committee of United States Steel Corporation was held at 600 Grant Street, Pittsburgh, Pennsylvania, on Monday, October 22, 1984, at 9:15 A.M.

There were present:

D. M. Roderick
T. C. Graham
R. M. Hays
H. D. Hoopman
J. B. Johnston
T. Marshall
W. E. Swales
W. B. Thomas

being a quorum.

The Chairman, D. M. Roderick, presided. R. M. Hays was Secretary.

Revision to PER 223-51

On motion, duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED: That revision of PER 223-51, Leaves of Absence, in the Administration Manual - Personnel, as set forth in statement submitted to this meeting, be, and the same hereby is, authorized as amended at the meeting.

Adjournment — On motion, duly made, seconded and unanimously carried, the meeting adjourned.

/s/ R. M. Hays
Secretary

FOR CONSIDERATION OF THE
CORPORATE POLICY COMMITTEE

October 22, 1984

Company: United States Steel Corporation

Subject: Revision of PER 223-51, Leaves of Absence

Scope: Former Employees of United States Steel Corporation who are current employees of the United Steelworkers of America International Union as defined in the Proposal

Basis for Proposal: Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agree-

ments. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.

Therefore, it is proposed that the Leave of Absence Policy be revised to permit granting leaves of absence beyond two years with the concurrence of the Corporate Policy Committee.

Proposal: Effective February 29, 1984

(a) Amend paragraph B.2.d of PER 223-51 by replacing the second sentence of such paragraph with the following sentence (underscoring denotes the change):

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Grant leaves of absence to former employees who meet the conditions specified below:

A leave of absence shall be granted for the period between the date on which the employee left active employment with United States Steel Corporation and the earlier of (i) the date of retirement from United States Steel Corporation, or (ii) the date employment with the United Steelworkers of America International

Union terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union, (b) from the time of cessation of active employment until February 29, 1984 shall have continued in the active employment of the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed.

Recommendation: That the foregoing proposals be adopted by the Corporate Policy Committee.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

APPENDIX G

PLAINTIFF'S EXHIBIT #96

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

April 28, 1987

Dear Mr. Williams

As you may recall, on March 5, 1985, I wrote you to advise that the then United States Steel Corporation had amended its leave-of-absence policy in order to permit the award of retroactive leaves of absence to designated union officials who had left its employ prior to January 1, 1978 to accept positions with the International Union. Eligibility for such leaves of absence was limited to employees who had previously worked in USX's then existing steel producing operations and who had continuously serviced the USX division which they had left. Moreover such leaves of absence would permit employees to receive pension credit for certain types of pension only. This amendment had been adopted in response to complaints by International Union officials that USX had been much more restrictive in its grants of leaves of absence to long term Union officials than had the other employers in the steel industry.

Although at the time, we believed that granting of such leaves of absence was fully permissible under law, we have now concluded in view of recent Decisions by the Second Circuit Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et. al.*, 791 F.2d 1046 (2d Cir. 1986) and most particularly, by the Third Circuit Court of Appeals in *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Cir. 1986, cert. den. 1986) that granting

such leaves of absence (or accepting such leaves of absence) violates the prohibitions of Section 302 of the Labor Management Relations Act.

Accordingly, we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change, we are denying several recent requests for such leaves of absence (apparently based on the earlier amendment) from employees of the International Union. We are not rescinding the leaves of absence which previously had been granted pursuant to such policy.

Yours very truly,

/s/ J. Bruce Johnston

J. Bruce Johnston

APPENDIX H

PLAINTIFF'S EXHIBIT #79

FOR CONSIDERATION OF THE
CORPORATE POLICY COMMITTEE May 14, 1987

Company:	USS, Division of USX Corporation
Subject:	Revision of PER 223-51
Scope:	Former Employees of USS Division who are currently employees of the United Steelworkers of America
Basis for Proposal	On October 22, 1984, the Corporate Policy Committee approved an amendment to PER 223-51 which permitted the granting of leaves of absence for more than a two year period to certain former USS Division employees who left the Company to work for the United Steelworkers of America International Union (USW). The eligibility criteria for such long term leaves of absence were spelled out in the proposal adopted by the Corporate Policy Committee on October 22, 1984. Pursuant to such policy, leaves of absence have been granted to seven former employees. At present, there are pending applications for leaves of absence by another seven former employees who may or may not otherwise satisfy the conditions for such leaves. However, in view of recent decisions of the Third *Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC,* 785 F.2d 101 (3rd Cir. Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Workers's Union and AFL-CIO, et al.,* 791

F.2d 1046 (2d Cir. 1986), it is now clear that granting long term leaves of absence to employees who have left the employ of the Company to take positions with the USW violates the Labor Management Relations Act.

Therefore, it is proposed that the Leave of Absence Policy be revised to prohibit granting leaves of absence beyond two years.

Proposal: Effective April 1, 1987

(a) Amend Paragraph B-2-d of PER 223-51 by deleting the underscored material in the second sentence of this paragraph:

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Rescind the grant of authority contained in the Corporate Policy Committee Resolution of October 22, 1984 which permitted the Executive Vice President-Employee Relations to approve applications for extended leaves of absence by former employees who met the conditions specified in such resolution.

Recommendation: Proposal adoption by the Corporate Policy Committee. The Law Department concurs in this recommendation.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

APPENDIX I

PLAINTIFF'S EXHIBIT #88

USX CORPORATION
EXECUTIVE VICE PRESIDENT
EMPLOYEE RELATIONS
April 16, 1987

J. Bruce Johnston:

Re: *Long-Term Leaves of Absence for Union Personnel*

This is to follow up on our several discussions on the above subject. Attached for your information is a copy of a memorandum prepared by Paul A. Robb of this department concerning the impact of *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et al.*, 791 F.2d 1046 (2d Cir. 1986) and *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Circuit 1986, *cert. denied* (1986) on a proposal advanced by the Union in the summer of 1986 which proposal called for USX to grant retroactively leaves of absence for up to 10 years to employees who left USX's employ to take positions with the Union. In this memorandum, Mr. Robb concluded that such proposal violated Section 302 of the LMRA since it involved giving a thing of value (pension credit) to Union officials who by definition would not be rendering any service to the employer in the short term. Mr. Robb concluded that such action would be indistinguishable from the action of contributing to a multi-employer pension fund on behalf of employees who had taken long term leaves of absence to accept union positions — an action which the Third Circuit held illegal in *Trailways.*

Although his memorandum was directed at the specific proposal orally made by the USW in the summer of 1986 and withdrawn by the USW when we requested that the proposal be

applicable to our current policy (established in 1984) of granting, subject to the approval of CPC, long-term leaves of absence to employees who had left USX's service in the past to take employment with the Union and who had been denied renewal of leaves of absence after the initial one year leave of absence and the standard renewal of the same. Although our best legal judgment at the time such policy was adopted indicated that it complied with the law, it is the opinion of this department that such a position is no longer tenable in view of *Trailways* and *BASF Wyandotte.*

Accordingly, it is our recommendation that such policy be abolished immediately. To accomplish this, we suggest that CPC rescind the policy adopted in 1984, that PER 223-51, Section B-2-d be revised to its pre-1984 state which limited leaves of absence to one for one year with a renewal for a second year, and that the International Union be advised that in view of the *Trailways* decision, we believe it is illegal to grant leaves of absence for longer than two years. Accordingly, the requests for leaves of absence on a retroactive basis made by Messrs. Toth, et al. should be denied on this basis.

/s/ James T. Carney
James T. Carney

Attachment

cc: T. W. Sterling
J. D. Short
D. B. King
W. R. Hawkins
S. G. Clark

APPENDIX J

PLAINTIFF'S EXHIBIT #109

September 14, 1987

J. Bruce Johnston:

Re: *Union Leaves of Absence Communications Workers of America, AFL-CIO vs. Bell Atlantic Network Services Inc., et al.*

I have read the District Court's opinion in the above case. I should note that superficially the facts in this case seem to be closer to the USX situation than those in the *Trailways* case because both this case and our situation involve single employer plans in which the Union normally does not have any role in plan administration. *Trailways*, on the other hand, involved a multi-employer plan. Despite this similarity between our situation and *Bell Atlantic* and the dissimilarity between our situation and *Trailways*, I believe our situation to be closer to the *Trailways* situation than to the *Bell Atlantic* situation because our situation resembles *Trailways* with respect to several factors which the court in *Bell Atlantic* found to be significant in distinguishing *Bell Atlantic* from *Trailways*.

1. The leaves of absence in *Bell Atlantic* involved some element of company discretion. Leaves of absence are non-discretionary in our case and in *Trailways*.

2. The leaves of absence in *Bell Atlantic* could not exceed a maximum of 18 years and averaged about 4.8 years. In our case, as in *Trailways*, the leaves of absence are unlimited and, in the case of the Fairfield group, exceed 15 years in most instances.

3. The collective bargaining agreement providing for leaves of absence in *Bell Atlantic* was ratified by the members. In our cases, the agreement was never ratified by the members and was apparently kept secret from many Union officials.

4. The collective bargaining agreement provisions relative to the leaves of absence in *Bell Atlantic* go back to the late 1940's whereas ours originated in 1984.

5. Pension benefits in *Bell Atlantic* were based on last employment with the employer. In our situation, pension benefits are based on upgrading of the minimum formula. In *Trailways*, pension benefits are based on the upgrading of salary.

Although I note these significant differences in the facts of *Bell Atlantic* and the facts of *Trailways*, we should recognize that these differences may not have led Judge Gasch (the judge in the *Bell Atlantic* case) to a different result since Judge Gasch (a Johnson appointee) in *Bell Atlantic* set forth his view that Trailways was wrongly decided.

Given the fact that *Bell Atlantic* is only a district court decision and the *Trailways* decision is from the Third Circuit which is the most likely circuit in which action will be brought against USX concerning this matter, and given the fact that we have obtained CPC approval for our current position, it is my recommendation that we continue to take the position that the former policy violates the law and that we cannot and will not reinstitute the same without a specific order of court. If you concur in the above, I suggest that we communicate the same to Mr. Toth and company by letter. I believe that to have a further meeting to announce USX's decision would be counterproductive and probably aggravate hard feelings.

/s/ James T. Carney
James T. Carney

pfc
cc: James D. Short

APPENDIX K

PLAINTIFF'S EXHIBIT #21

UNION MEETING MINUTES

Leaves of Absence

September 3, 1987 - 10:15 a.m.

USW: Toth, Foley & Eckman

USX: Johnston, Short & Carney

Toth says he has received Short's letter denying his claim. He says the Union has difficulty understanding how the company can change or rescind the policy retroactively in the sense that the Toth application and others had been filed. Two groups: (1) those who had vested USX pensions (Toth and Foley); (2) those who did not have vested USX pensions. Toth says that when policy was adopted, both groups should have been given pension continuous severance. Toth says he and Foley have worked continuously servicing USX units. Toth asks for copy of initial letter to Williams. Johnston indicates that Toth should get initial letter from Williams. Toth says he would do so. Toth claims that Trailways case relied upon by USX involves multi-employer plan. Toth points out that USW had made demand in this area in negotiations unaware that USS already had taken some action in this area. Short points out that he requested a written demand from the Union and Toth had dropped the matter at that point.

Johnston reviews history of USX policy on leaves of absence for Union officials. He states that he had discussed matters with Abel, McBride and Odercich but not with Williams. Toth suggests Johnston/Williams do not get along. Johnston says no personal antagonism; significant conflict with Williams because of institutional differences. USX strictly limited leaves of absence. Abel and McBride agreed. Bredhoff raised problem of Union officials not getting deferred vested pensions even though

they would have been eligible under the 1975 pension agreement liberalized vesting standards.

Fairfield became major problem with restrictive work practices. Local negotiations approved by McBride. Miller heads up for USX. Williams called Johnston on Ambridge in December 1983. Johnston says Union must remove veto on local deal at Fairfield if he is to extend pension agreement at Ambridge. Rich says if Union is to liberalize work practices at Fairfield, USX should liberalize leave of absence policy. USX representatives outline willingness to make recommendations for policy liberalizations. Policy Committee adopts the revised policy; Johnston notifies the Union. Law changes with Trailways decision. Carney calls this to attention of Johnston and Policy Committee changes policy; not retroactively.

Toth recites history of Bell Atlantic case. He agrees to supply USX with copy of the decision. Johnston says he will examine. Toth asks about Thrasher settlement. Johnston says he did not approve Thrasher deal. Johnston says policy was clearly intended to apply across the board. Toth asks why plan participants not advised. Carney says no change to plan itself so no need to notify participants. Johnston points out that he sent letter to Williams as head of the Union but received no response. Toth indicates that he thought there had been a response. Johnston gives Toth a copy of the CPC resolution in question.

* * *

APPENDIX L

PLAINTIFF'S EXHIBIT #108

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. Thermon Phillips
1240 Southwind Drive
Helena, AL 35080

Dear Mr. Phillips:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union

officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently, two lawsuits have been filed by former and present Union officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration